



# Arbitration in Germany

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## 1. Arbitration in Germany

When amending the arbitration law<sup>1</sup> in 1998, German lawmakers made allowance for the increased importance of arbitration for business and adopted the globally recognized<sup>2</sup> "UNCITRAL Model Law on International Commercial Arbitration-1985" (Model Law - ML)<sup>3</sup> with very few modifications.

Germany has been a member of the "Convention on the Recognition and Enforcement of Foreign Arbitral Awards - the New York Convention - 1958 (NYC)"<sup>4</sup> since 1961.

Via the "Deutsche Institution für Schiedsgerichtsbarkeit e.V." (DIS)<sup>5</sup> (German Institution for Arbitration), Germany has an internationally accepted arbitration institution, which administers both national and international arbitral proceedings according to the DIS Arbitration Rules of 1998 (DIS-Rules 98)<sup>6</sup>. The DIS has approximately 800 members from Germany and other countries. The number of DIS arbitral proceedings – including those involving foreign parties – has increased in the last few years.

## 2. German Arbitration Law

### 2.1 Place of Arbitration in Germany

The applicable arbitration law is determined by the agreement on the place of arbitration. If the parties specify Nuremberg, for example, as the place of arbitration in their arbitration agreement, then the German Arbitration Law<sup>7</sup> is automatically applied<sup>8</sup>.

The German Arbitration Law is available to parties in a number of languages<sup>9</sup>, as is the Model Law<sup>10</sup>, which was absorbed by the German Arbitration Law with only a few changes. Thus, before entering into the arbitration agreement and before initiating arbitral proceedings, the parties can easily obtain an overview of the legal framework – e.g. regarding the requirements for an effective arbitration agreement and the conduct of the proceedings.

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<sup>1</sup> §§ 1025 ff. Zivilprozessordnung (ZPO) (code of civil procedure- German Arbitration Law)

<sup>2</sup> Currently adopted by more than 51 states; Status [www.uncitral.org](http://www.uncitral.org)

<sup>3</sup> [www.uncitral.org](http://www.uncitral.org)

<sup>4</sup> Currently ratified by more than 142 states; [www.uncitral.org](http://www.uncitral.org)

<sup>5</sup> In accordance with the articles of association, headquarters in Berlin and head office in Cologne; [www.dis-arb.de](http://www.dis-arb.de)

<sup>6</sup> Current version dated 07/01/1998

<sup>7</sup> §§ 1025 ff ZPO

<sup>8</sup> In addition to the application of arbitration law, selecting the place of arbitral proceedings also determines the jurisdiction of the ordinary courts, which are responsible for interim legal arrangements and for the setting aside or recognition of arbitral awards.

<sup>9</sup> On the home page of DIS [www.dis-arb.de](http://www.dis-arb.de) in German, English, French, Spanish, and Russian

<sup>10</sup> In the six official languages of the United Nations (Arabic, Chinese, English, French, Russian, and Spanish) [www.uncitral.org](http://www.uncitral.org)



## 2.2 Flexibility of the Parties

German Arbitration Law grants parties a high degree of flexibility when conducting arbitral proceedings. This includes the selection of an arbitration institution (e.g., DIS or ICC in Paris) as administering institution and the application of its arbitration rules. If no compulsory rules exist, the conduct of the arbitral proceedings is subject to the agreements between the parties. Compulsory rules include, for example, a party's right to present its case and the equal treatment of all parties.

## 3. Form and Content of the Arbitration Agreement

### 3.1 Autonomy of the Arbitration Agreement

As in most arbitration laws, the autonomy principle of the arbitration agreement<sup>11</sup> also applies in Germany, which means that the arbitration agreement is always conceived as a contract that is independent of the main contract. This also applies if the arbitration agreement is simply included as a clause in the main contract. The autonomy principle has the legal advantage that a possible invalidity of the main contract does not automatically infect the arbitration agreement, and the arbitral tribunal in this case maintains jurisdiction to adjudicate the legal dispute.

### 3.2 Form of the Arbitration Agreement

According to the international standard of the New York Convention<sup>12</sup>, the arbitration agreement must be stipulated in writing, i.e., it must be contained in a contract signed by the parties or in written correspondence (letter, fax, or telegram) exchanged by the parties. Like the Model Law, the German Arbitration Law has adopted this formal regulation<sup>13</sup>, but implements some simplifications of the written form requirement, such as allowing arbitration agreements in general terms and conditions. However, international recognition and enforcement of arbitral awards is only guaranteed if the New York Convention's written form requirement for arbitration agreements is observed.

### 3.3 Content of the Arbitration Agreement

An arbitration agreement must include not only the exclusion of ordinary jurisdiction regarding decisions on legal disputes, but also regulations as to the place of arbitration,

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<sup>11</sup> § 1040 Abs. 1 ZPO, Art. 16 Sect. 2 and 3 ML

<sup>12</sup> Art. II Sect. 2 NYC

<sup>13</sup> § 1031 ZPO, Art. 7. ML



the number of arbitrators, the applicable material law, the language, the rules of arbitration, and, if required, confidentiality.

### 3.3.1 Place of Arbitration

As already mentioned (2.), specifying of the place of arbitration is an essential stipulation with far-reaching consequences. The place of arbitration must be differentiated from the meeting place of the arbitral tribunal. The parties and the arbitral tribunal are free to determine the meeting place, without this having any impact on the place of arbitration. If the parties have agreed on Nuremberg as the place of arbitration, for example, then the German Arbitration Law shall apply even if the arbitral tribunal and the parties meet for the proceedings in Zurich.

### 3.3.2 Number of Arbitrators

According to German Arbitration Law, parties are free to determine the number of arbitrators. If the parties fail to designate the number, the arbitral tribunal shall consist of three arbitrators<sup>14</sup>. A corresponding regulation can also be found in the DIS-Rules 98<sup>15</sup>. In case the arbitral tribunal consists of three arbitrators, each party can choose an independent arbitrator in whom it trusts. These two arbitrators shall then nominate the third arbitrator to be the chairperson of the arbitral tribunal.

### 3.3.3 Applicable Material Law

German Arbitration Law allows parties to freely determine which material law shall be applied<sup>16</sup>. The parties can therefore determine the provisions of material law according to which the arbitral tribunal must render the arbitral award. German procedural law provides that the arbitral tribunal must decide according to the applicable material law and is only allowed to decide "ex aequo et bono" or as "amiabile compositeur" if the parties have expressly authorized the tribunal to do so. It stands to reason that differences often exist between the various legal systems, which could be decisive in the event of a dispute. It is therefore recommended that parties always come to an agreement in advance as to the applicable material law. If the parties have not agreed on the applicable material law, German Arbitration Law<sup>17</sup> provides that the laws of the

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<sup>14</sup> § 1034 Abs. 1 ZPO, Art. 10 ML

<sup>15</sup> § 3 DIS-Rules 98

<sup>16</sup> § 1051 ZPO, Art. 26 ML

<sup>17</sup> § 1051 Sect. 2 ZPO, Art. 26 ML



country with which the object of dispute is most closely connected shall be applied, for example, the place of fulfillment for supply contracts. This decision shall be made by the arbitral tribunal.

### 3.3.4 Language of the Proceedings

The language of the proceedings shall decide the language in which the arbitral proceedings are conducted and the language in which documents must be presented. Therefore, the specified language has a large impact on the selection of arbitrators. If the parties do not decide on the language, the arbitral tribunal shall determine the language of the proceedings<sup>18</sup>.

### 3.3.5 Rules of Arbitration

The advantage of agreeing on rules of arbitration lies in the fact that the arbitral proceedings are administered by the arbitral institution according to its respective rules. If the DIS is specified as the administering institution, which among other things will deliver the request for arbitration and the pleadings to the parties, the arbitral proceedings will begin at the time the request for arbitration is received at the DIS Secretariat<sup>19</sup>. The commencement of the arbitral proceedings generally delays or interrupts the limitation period in respect of a claim. The fact that the request for arbitration no longer needs to be served on the respondent in order to delay or interrupt an impending limitation period is of particular advantage if the request for arbitration must be served overseas at the respondent's registered office.

### 3.3.6 Confidentiality

In each individual case, it must be determined whether the obligation of the parties to maintain confidentiality regarding the conduct and content of an arbitral proceeding and the parties involved is to be regulated by the arbitration agreement or not. Confidentiality is not regulated in many arbitration laws – including the German Arbitration Law<sup>20</sup> – and in many rules of arbitral institutions. It is generally acknowledged, for arbitrators, that even without express regulation, a duty to maintain confidentiality with respect to the arbitral proceedings is in force. With respect to provisions of the DIS-Rules 98, on the other hand, a regulation of confidentiality is

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<sup>18</sup> § 1054 Sect. 1 ZPO, Art. 22 Sect. 1 ML

<sup>19</sup> § 6 DIS-Rules 98

<sup>20</sup> §§ 1025 ff. ZPO



wholly unnecessary. This is because parties, arbitrators, and the DIS Secretariat are already obliged to maintain confidentiality regarding the conduct of the arbitral proceedings and the participating parties<sup>21</sup>.

#### 4. Arbitrability of Claims

According to German Arbitration Law<sup>22</sup>, any claim involving an economic interest can be the subject of an arbitration agreement. Claims not involving an economic interest can only be the subject of an arbitration agreement if the parties themselves have the authority to possibly reach a settlement regarding the matter in dispute. Also arbitrable according to German law are actions of nullity and legal challenges under company law or anti-trust disputes, but not patent disputes. In Germany, the Federal Patents Court is solely responsible for declarations of nullity regarding patents.

#### 5. Qualification of Arbitrators

The parties are free to select arbitrators of their choice. Arbitrators can be any natural persons, regardless of nationality and professional qualification. Arbitrators can therefore also include persons who are not lawyers or legal experts, such as technical experts. The parties can therefore select arbitrators who have particular technical or legal expertise in the subject matters in dispute and can therefore best determine the quality and competence of the arbitral tribunal in each individual case. If the DIS-Rules 98<sup>23</sup> are decided upon, the presiding arbitrator must be a lawyer, unless the parties have agreed otherwise. Liability insurance companies in Germany often require this as well, in addition with the requirement that the arbitral tribunal must be comprised of three arbitrators.

According to German Arbitration Law, the arbitrators must be impartial and independent. Arbitrators can be disqualified by the parties on grounds of bias because of presumed partiality<sup>24</sup>. Each arbitrator is also obliged to immediately disclose all circumstances that could create doubt as to its impartiality or independence. This duty to disclose information exists before acceptance of arbitrator appointment and lasts throughout the entire arbitral proceedings.

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<sup>21</sup> § 43 DIS-Rules 98: the Swiss Rules contain a similar ruling in Art. 43; when applying the ICC Rules, the situation already becomes more complicated; only the arbitral tribunal and the ICC Court of Arbitration are obliged to maintain confidentiality ; this only applies for the parties if the arbitral tribunal implements measures of confidentiality according to Art. 20.7 ICC Rules.

<sup>22</sup> § 1030 ZPO, Art. 1 Sect. 5 ML

<sup>23</sup> § 2.2 DIS-Rules 98



## 6. Arbitral Awards

The arbitral tribunal decides on an arbitral award by a majority vote of the arbitrators. The arbitral award must be issued in writing and be justified, unless the parties have waived the requirement for justification. It is permissible to waive the requirement for justification according to both German Arbitration Law<sup>25</sup> and according to the DIS-Rules 98. Waiving justification is not advisable, however, since it makes control of the arbitral award more difficult in the recognition proceedings and can result in loss of coverage of liability insurance in liability actions.

## 7. Function of Ordinary Courts

### 7.1 Competence to Verify Jurisdiction

If an effective arbitration agreement has been agreed upon, jurisdiction of the ordinary courts for decisions regarding legal disputes shall be excluded. If the jurisdiction of the arbitral tribunal is contested before an ordinary court, the arbitral tribunal does not have the capacity to make a binding decision regarding its own jurisdiction. A decision regarding this issue shall be a matter solely for the ordinary courts.

### 7.2 Interim Legal Protection

Arbitral tribunals can also arrange for interim measures<sup>26</sup>. These measures can only be enforced by ordinary courts, however. Since this method is often too drawn-out, it is also possible to request arrangements for and subsequent conduct of interim measures directly at the ordinary courts<sup>27</sup>. In the hearing of evidence or the undertaking of other judicial actions, the arbitral tribunal or one party with the approval of the arbitral tribunal can also request support from the ordinary courts<sup>28</sup>.

### 7.3 Setting Aside and Enforcement of Arbitral Awards

The relevant Higher Regional Court is responsible for examining arbitral awards. In these matters, the Higher Regional Court is not a full court of appeal, however, but it simply inspects within a very limited scope whether grounds for the setting aside or enforcement of the arbitral award exist, in particular in the event of violations of public

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<sup>24</sup> § 1036 ZPO, Art. 12 ML

<sup>25</sup> § 1054 Sect. 2 ZPO, Art 31 Sect. 2 ML; § 34.3 DIS-Rules 98; the ICC Rules 1998 do not permit the grounds for the arbitral award to be waived.

<sup>26</sup> § 1041 ZPO, Art. 17 ML

<sup>27</sup> § 1033 ZPO





policy. The reasons for setting aside in German Arbitration Law<sup>29</sup> correspond to the reasons of the New York Convention<sup>30</sup>. The same inspection standard applies for proceedings of recognition and enforcement of national and international arbitral awards.

## 8. Database

F+R Rechtsanwälte (F+R) (attorneys) have developed a digital knowledge management tool `fr_digital_knowledge_management` (`fr_dkm™`) which administrates the significant number of documents required during arbitral proceedings in one database. During the entire arbitral proceedings, all participants (parties, arbitral tribunal, arbitration institution, authorized experts) have online access (SSL encryption) to all documents. The database has already been used successfully for complex arbitral proceedings. .

## 9. Future Significance of Arbitration

Arbitration is gaining increased significance in Germany. Speed, flexibility, fundamental confidentiality, and – for international arbitral proceedings– neutrality are some of the great advantages that should not be overlooked by any business when drafting contracts.

## 10. Contact

If you would like more information on this topic, please get in touch with the author, [Annette Lionnet](#), co-author of "Handbuch der internationalen und nationalen Schiedsgerichtsbarkeit", Boorberg Verlag 3<sup>rd</sup> edition, 2005 at

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<sup>28</sup> § 1050 ZPO, Art. 27 ML

<sup>29</sup> § 101059ff. ZPO, Art. 34ff. ML

<sup>30</sup> Art. V NYC